No. 15471

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

SAFEWAY STORES, INC., a corporation,

Appellee.

APPELLEE'S BRIEF.

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Preliminary Statement.

The Jurisdictional Statement and Statement of the Case contained in Appellant's Opening Brief (hereinafter cited as "App. Op. Br.") are substantially correct. As indicated in Appellant's Opening Brief, the indictment here involved is in two counts. Each count is based upon alleged violations by Respondent, Safeway Stores, Inc. (referred to herein as Safeway) of Section 78 of the Meat Inspection Act (21 U. S. C. §§71-91) in the transportation of certain non-federally inspected processed meat products between Safeway's Los Angeles, California, warehouse and its Las Vegas, Nevada, retail store.

Safeway moved to dismiss the indictment on two basic substantive legal grounds, each of which relates to each count of the indictment [R. pp. 5-7]:

(1) The indictment affirmatively shows on its face that defendant comes within the exception to the

statute upon which the alleged offense is based and therefore has not committed an offense against the United States;

(2) The indictment is insufficient in that it does not inform of the nature and cause of the accusation for the reasons (a) that there is no specific allegation negating the statutory exemption exempting retail dealers in meat and meat products supplying their customers, and (b) that it does not appear whether defendant is being charged as such retail meat products dealer with the offense created by the statute, or otherwise. [R. pp. 5-7.]

The District Court granted Safeway's motion by minute order dated October 16, 1956, and dismissed the indictment. Subsequently, on October 24, 1956, formal order was entered [R. p. 36].[1]

The correctness of the District Court's ruling is the one question presented by this appeal. As an additional point, Safeway challenges the constitutionality of the statute upon which the indictment is based.[2]

The separate points in support of the Court's ruling are set forth in our summary. We shall present these points in the order named without regard to their arrangement

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[1]Neither the minute order nor the Court's formal order indicate the basis of the Court's decision to dismiss the indictment.

[2]This point, while not specifically raised below, may be considered by this Court on appeal. *United States v. Ury* (2d Cir. 1939), 106 F. 2d 28.

in Appellant's Brief. Each of these several points in itself requires an affirmance of the order of dismissal.

All emphasis throughout the argument will be ours unless otherwise noted.

Summary of Argument.

There are three independent reasons why the Judgment of Dismissal should be affirmed.

I. The indictment does not sufficiently inform respondent of the nature and cause of the accusation in that:

(a) It fails specifically to allege that respondent does not come within the statutory exception exempting retail dealers in meat and meat products supplying their customers, and

(b) It fails to show whether respondent is being charged as a retail dealer in meat and meat products supplying its customers, or otherwise.

II. Each count of the indictment alleges facts which show that respondent comes within the exceptions provided in the statute upon which the alleged offense is based.

III. The statute upon which the indictment is based is unconstitutional in that it is so vague and uncertain that it fails to give fair warning or establish an ascertainable standard of guilt and therefore violates the Fifth and Sixth Amendments to the Constitution of the United States.

I.

Each Count of the Indictment Alleges Facts Which Show That Respondent Comes Within the Exception Provided in the Statute Upon Which the Alleged Offense Is Based, Exempting Retail Dealers in Meat and Meat Products Supplying Their Customers.

Basically, the indictment charges in each count thereof that Safeway *transported* from its own warehouse in Los Angeles to its own retail store in Las Vegas certain meat food products which had not been inspected, examined and marked " 'Inspected and Passed' as required by law." Accordingly, in order to determine whether a statutory offense has been committed, reference must be made to the requirements of the law relating to inspection of meat food products and transportation of these products in interstate commerce.

It will appear that, by the very terms of the statute involved, a retail dealer in meat and meat food products such as Safeway, transporting those products in interstate commerce for sale to its customers, is not required to obtain federal inspection thereof.

Section 78 of Title 21 of the United States Code makes it unlawful to transport in interstate commerce meat or meat food products which have not been inspected, examined, and marked "Inspected and Passed" in accordance with Sections 71 to 94 of Title 21. Section 91 of Title 21 specifically excepts from the provisions of Sections 71-91 requiring inspection, "retail dealers in meat and meat food products, supplying their customers." The applicable portion of Section 91, as amended, reads as follows:

> "The provisions of sections 71-91 of this title, requiring inspection to be made by the Secretary of

> Agriculture shall not apply to animals slaughtered by any farmer on the farm and sold and transported in interstate or foreign commerce, *nor to retail butchers and retail dealers in meat and meat food products, supplying their customers.*"
>
> 21 U. S. C. 91.

A retail dealer in meat products is defined by Section 91(c) to be one who sells meat products principally to consumers. The pertinent language of the paragraph is as follows:

> "A 'retail dealer' means any person, partnership, association, or corporation chiefly engaged in selling meat or meat food products to consumers only * * *."
>
> 21 U. S. C. 91(c).

Analyzing the allegations of the indictment, it is apparent that Safeway has not violated the statute: Safeway Stores, Inc., a well-known national retail grocery chain outlet[3], was transporting meat food products from its warehouse to its retail store. Acccordingly, it was acting as a retail dealer in meat and meat food products supplying its customers. This being true, Safeway is exempt from the inspection requirements of the Meat Inspection Act, and the meat products transported by it to its retail store are not, under the Act, required to be *federally inspected.*

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[3]The Government, in its brief (App. Op. Br. p. 15), appears to challenge for the first time on appeal that the Court may not take judicial notice of the fact that Safeway is not a large retail grocery chain. That a court may judicially notice facts of common knowledge is a rule of long standing. (*Sears, Roebuck & Co. v. Blade* (S. D. Cal. 1954), 123 F. Supp. 131, where the Court held that it could take judicial notice of the fact that Sears was a large retail chain.)

Since it appears on the face of the indictment that the meat food products here in issue were not "required by law" to be inspected, the indictment does not charge the defendant with a crime under the statute. Therefore, the action of the District Court in dismissing the indictment should be affirmed. (Rule 12 (b) (1) Fed. R. Crim. Proc.)

Appellant apparently concedes that a retail dealer is exempt under the Act, but argues that Safeway does not meet the statutory definition of "retail dealer."

In this connection appellant contends, as we read its brief, that (1) the statute should be interpreted to exempt only retail dealers whose business is *chiefly* selling meat products to consumers, (2) Safeway's operation is not in the nature of a retail operation as contemplated by the statute, (3) the exemption is not automatic—it can be granted only by the Secretary of Agriculture upon application by the retail dealer, and (4) the statute restricts the transporting of uninspected meat products to consumers only.

The effect of the Government's first basic contention, that the proviso in question applies only to retail dealers chiefly engaged in the business of selling meat to consumers, is to restrict the application of the statute to retail butchers. This contention is made notwithstanding the language of the statute exempting "retail butchers and retail dealers in meat and meat food products." Such a construction not only ignores the conjunctive "and" but makes the exemption which specifically mentions retail dealers (Sec. 91(c)) superfluous and would emasculate that entire section. The Government's interpretation violates the cardinal principle of statutory construction, that significance and effect shall, if possible, be accorded to every word in the statute. As the Supreme Court aptly

said in *United States v. Menasche* (1955), 348 U. S. 528, 538-539, 99 L. Ed. 615, 624:

> "The Government's contention that §405(a) does not apply to any phase in the processing of naturalization petitions would defeat and destroy the plain meaning of that section. 'The cardinal principle of statutory construction is to save and not to destroy.' *N.L.R.B. v. Jones & L. Steel Corp.,* 301 U. S. 1, 30, 81 L. Ed. 893, 907, 57 S. Ct. 615, 108 A. L. R. 1352. It is our duty 'to give effect, if possible, to every clause and word of a statute.' *Montclair v. Ramsdell,* 107 U. S. 147, 152, 27 L. Ed. 431, 433, 2 S. Ct. 391; rather than to emasculate an entire section, as the Government's interpretation requires."
>
> *United States v. Menasche,* 348 U. S. 528, 538-539, 99 L. Ed. 615, 624.

Similarly, this Court, in *Higa v. Transocean Airlines* (9th Cir. 1955), 230 F. 2d 780, 784, in quoting from *Market Co. v. Hoffman* (1879), 101 U. S. 112, 25 L. Ed. 782, stated:

> "Construing the Act's words, if Higa's diversity proceeding at common law were permitted by the High Seas Act it would make superfluous its word 'in admiralty.' As was stated in *Market Co. v. Hoffman,* 101 U. S. 112, at pages 115, 116, 25 L. Ed. 782:
>
> " 'We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. *As early as in Bacon's Abridgment,* §2, *it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."* This rule has been repeated innumerable

> times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each.' "
>
> *Higa v. Transocean Airlines,* 230 F. 2d 780, 784.

Moreover, the courts have uniformly construed a penal statute, such as here involved, in favor of the party accused under its provisions and resolved any ambiguities in his favor. This principle alone would suffice to support the District Court's dismissal.

> *Schooler v. United States* (8th Cir., 1956), 231 F. 2d 560;
>
> *Belle v. United States* (1955), 349 U. S. 81, 99 L. Ed. 905.

The only possible interpretation which would comply with the aforementioned rules of statutory construction is that it exempts retail dealers selling meat *chiefly* to consumers, but does not exempt a wholesale dealer, *i. e.,* one selling meat to other dealers who in turn sell such meat to consumers. That Safeway is such a retail dealer seems apparent. Even the Government concedes that Safeway's meat department is "an important branch of its business" (App. Op. Br. p. 16) and that its volume of business is substantial (App. Op. Br. p. 17). The mere fact that Safeway maintains a central warehouse where it temporarily stores its products prior to distribution to its retail stores does not make it any the less a retailer. A retailer is one who sells to consumers whereas a wholesaler sells to retailers who then sell to consumers.

> *Roland Electric Co. v. Walling* (1946), 326 U. S. 657, 90 L. Ed. 383;
>
> *Zehring v. Brown Materials* (S. D. Cal. 1943), 48 F. Supp. 740, 743.

As an additional argument to their first basic contention, the Government asserts that there is a quantity limitation on retail dealers (App. Op. Br. p. 17) within the exemption which negates Safeway's contention that the indictment shows on its face that Safeway is exempt. This is likewise without merit.

Section 91(c) initially defines a retail dealer as one who sells meat to consumers. After making such definition there is a proviso which permits the Secretary of Agriculture to *expand* this definition by permitting a retail dealer to ship a limited quantity of meat carcasses to consumers and meat retailers. The significant language of this proviso following the definition of "retail dealer" is:

> "* * * *except that* the Secretary of Agriculture, at his discretion, *may permit* any retailer to transport in interstate trade * * * to consumers and meat retailers in any one week not more than * * *."
>
> 21 U. S. C. 91(c).

It is apparent that the only function of this proviso is to permit the Secretary of Agriculture to extend the exemption granted retail dealers to retail dealers who, in addition to their retail functions, are also performing the functions of a wholesale dealer, *i. e.,* shipping a limited number of carcasses to meat retailers. Safeway is a pure retail dealer and does not engage in the interstate commerce of meat as a wholesale dealer. Therefore, the number of carcasses which Safeway might transport in interstate commerce weekly is entirely immaterial and irrelevant as it has no bearing on whether or not Safeway is a retail dealer.

The Government's second basic contention, that the exemption was never intended to apply to the type of busi-

ness conducted by Safeway, is insupportable. Even the legislative history relied upon by the appellant and set forth in its brief (App. Op. Br. pp. 18-19) does not support its conclusion and there is no indication that any limitation was intended upon the size of a retail dealer.

It must be remembered that at the time the statute was enacted in 1907, and even at the time of the 1938 amendment, retail chain stores such as Safeway's type of operation were unknown. Retail businesses were conducted by small dealers, such as butcher shops or corner grocery stores, whose business was chiefly one or two major commodities such as meats and the like. However, recent times have seen the development of retail chains with commensurate expansion in the volume and number of items carried, improvement in sanitation conditions, merchandising and the like. To say that the retail chain is not exempt from the provisions of the statute, but that the small butcher shop or retailer is, makes little sense. Particularly is this true when the obvious intent of the statute is considered, which is to exempt retail dealers who sell meat to consumers.

It is a fundamental rule of statutory construction that a statute must be given a reasonable or rational interpretation. Contrariwise, a statute should not be so limited in its application as to lead to unreasonable and absurd consequences.

> *Fleischmann Construction Co. v. United States* (1926), 270 U. S. 349, 70 L. Ed. 624;
> *United States v. Katz* (1926), 271 U. S. 354, 70 L. Ed. 986, 987.

It is apparent that, if the statute were interpreted in the sense which the Government contends, it would lead

to the unreasonable and absurd consequences of exempting a small meat retailer but not a chain store who sells meat along with other items.

Moreover, if the Government's contention is sound, retail chain dealers in meat products, including Safeway, would be discriminated against and the statute would violate the due process clause because it would be arbitrary and injurious.

> *Currin v. Wallace* (1939), 306 U. S. 1, 83 L. Ed. 441;
>
> *Steward Machine Co. v. Davis* (1937), 301 U. S. 548, 81 L. Ed. 1279.

Further, appellant's allegation that Safeway's operation was in the nature of a wholesale operation rather than a retail operation is based upon a misconception of the function of a wholesale dealer. As previously indicated, Safeway clearly operates a retail business, although it does make use of a warehousing system.

Actually, as the legislative history of the Act reveals, it was never intended to encompass the retail sale of meat, but was directed at the activities of *livestock buyers* who had been buying very young calves, butchering and hauling them to large consuming centers where they were sold to commission farms. Thus, as pointed out in the House and Senate Report (H. R. 2310 and S. R. 2182) which accompanied the 1938 amendment to Section 91:[4]

> "The purpose of this legislation is to provide more effective inspection and control of the meats which are being sold in the markets. Hundreds of thousands

[4]Section 91 was amended in 1938 by a rewriting of the entire section, including the addition of the definitions outlined in Subparagraphs (a) through (c).

> of calves, most of them unfit for human consumption, the majority only a few days old, are bought up by unscrupulous livestock buyers for a price ranging from $1 to $5 each, and these are butchered and hauled to the markets of the large consuming centers and sold to commission farms. In turn, they are sold to retail butchers, and thus they find their way to the consumers, who usually buy the meat for a price that seems attractive * * *.
>
> "The bill does not change the farmer's status, but it will *prohibit livestock buyers from continuing this practice* and will be of material benefit to the consuming public."

The Government further argues that the exemption granted by the paragraph of Section 91 following Subsection (c) is a part of Subsection (c) and applies only to the Secretary of Agriculture and not to retail dealers in meat (App. Op. Br. pp. 19, 20), that since Paragraph 78 merely prohibits the transportation of meat, it does not require the Secretary to make inspection and Safeway cannot be within the exemption. It is apparent from a mere examination of the language of the statute that the Government's contention is fallacious. The exemption section (the final paragraph of Sec. 91), is not a part of Subsection (c) but is a complete paragraph standing by itself and exempts not the Secretary of Agriculture but retail dealers in meat food products supplying their customers from the provisions of the Meat Inspection Act. Subsection (c) merely defines the term "retail dealer." The effect of the Government's contention is to completely read out of the statute the words "shall not apply

* * * to retail dealers in meat and meat food products, supplying their customers" in the final paragraph of Section 91. Of course, such a result cannot be obtained without legislative mandate.

United States v. Menasche (1955), 348 U. S. 528, 538-539, 99 L. Ed. 615, 624;

Higa v. Transocean Airlines (9th Cir., 1955), 230 F. 2d 780, 784.

Since the exemption of Paragraph 91, if it is to be given any effect whatsoever, must be applicable to retail dealers in meat and meat products supplying their customers, it would likewise exempt retail dealers transporting such meat to their customers. The very language of Section 78 clearly contemplates that the exemption of Section 91 applies, since the transportation of uninspected meat is illegal only if the meat is required to be inspected. Section 78 says in this regard:

> "No person, * * * shall transport * * * meat food products thereof which have not been *inspected, examined, and marked as 'Inspected and passed,' in accordance with the terms* of sections 71 to 94, inclusive, * * *."
>
> 21 U. S. C. 78.

Moreover, the very legislative history relied on by appellant (App. Op. Br. p. 18) indicates that it was intended to exempt a dealer transporting meat in interstate commerce. Accordingly, Congress did intend to exempt retail dealers, *not* the Secretary of Agriculture, and such exemption extended to transportation, the act prohibited by Section 78. Manifestly, the exemption relied upon is

automatic and not subject to the discretion of the Secretary of Agriculture.

Appellant's final argument, that there is a distinction under the exemption provision between animal carcasses and meat food products (App. Op. Br. pp. 21-24), is based upon the same distortion of the statute as previously commented upon. There is no question that the first part of the proviso contained in Subsection (c) of Section 91 permits the Secretary of Agriculture to allow retail dealers to transport a limited quantity of animal carcasses to consumers and meat retailers. This merely permits the Secretary of Agriculture to extend the definition of a retail dealer. However, there is no indication that the last part of the proviso was intended to allow him to limit the definition of "retail dealer."

In concluding, the Government argues that, if the exemption provision of the Act would have the effect of exempting large chain stores from compliance, the purpose of the Act, the protection of the consuming public from the danger of impure and unwholesome meat and meat food products, would be defeated. However, the Government fails to point out how the purpose of the Act would be furthered by exempting a retail butcher, such as the small dealer referred to in the Congressional history, quoted by the Government in its brief (App. Op. Br. p. 18), who may be located near a state line and who in the course of his business peddles meat from a wagon or cart passing over a state line. It seems

obvious that the danger to the consuming public from impure and unwholesome meat is considerably enlarged by this type of operation which the Government concedes is exempted from the application of the Act. On the other hand, it is absurd to argue that the typical large chain store such as Safeway, with its sanitary control and its high consumer acceptance of its meat products, could, by being exempt from compliance with the Act, thereby endanger the consuming public by selling impure and unwholesome meat. We submit, therefore, that the effectiveness of the statute would not be impaired by exempting the chain stores such as Safeway, or other retailers who chiefly sell meat to consumers, from the provisions of the Act.

Safeway transported meat food products in interstate commerce to its retail store for consumers only and was, therefore, a retail dealer as defined by the statute, regardless of any action taken by the Secretary of Agriculture. Accordingly, Safeway was automatically exempt under the Act and, therefore, the action of the District Court in dismissing the indictment should be affirmed.

For the reasons above set forth, we submit that it is self-evident that Safeway comes within the exception provided in the statute upon which the alleged offense is based and, accordingly, for these reasons alone the dismissal of the indictment should be affirmed.

II.

The Indictment Does Not Sufficiently Inform Respondent of the Nature and Cause of the Accusation in That: (a) It Fails to Show That Respondent Does Not Come Within the Statutory Exception Exempting Retail Dealers in Meat and Meat Products Supplying Their Customers, and (b) It Fails to Show Whether Respondent Is Being Charged as a Retail Dealer in Meat and Meat Products Supplying Its Customers or Otherwise.

We have already shown that the indictment is fatally deficient because it affirmatively shows that Safeway is within the provisions of the exemption to the statutory crime. However, even if this were not the case, the indictment must fail because of its failure sufficiently to inform Safeway of the nature and cause of the accusation.

A. The Indictment Fails Specifically to Allege That Respondent Does Not Come Within the Statutory Exception Exempting Retail Dealers in Meat and Meat Products Supplying Their Customers.

It is axiomatic that an indictment which does not sufficiently inform the defendant of the nature and cause of the accusation is fatally deficient and must be dismissed. That the indictment here involved suffers from this fatal deficiency is obvious from an analysis of the statutory crime. Section 78 of Title 21 of the United States Code provides substantially as follows:

> "No person, * * * shall transport * * * from one State * * * to any other State * * * any carcasses or parts thereof, meat or meat food products thereof which have not been inspected, examined and marked as 'Inspected and passed' *in accord-*

> *ance with the terms of sections 71 to 94, inclusive, of this title,* and with the rules and regulations prescribed by the Secretary of Agriculture."
>
> 21 U. S. C. 78.

It is apparent that the crime defined by the statute is the transportation of meat which has not been inspected in accordance with the terms of Sections 71 to 94 of the Act. Thus the exception contained in Section 91 is a component part of the definition of the offense and must be negatived by the indictment.

It is well settled that where a statute defining an offense contains an exception which is so incorporated with language defining the offense that the ingredients of offense cannot be accurately and clearly described if the exception is omitted, an indictment founded on such a statute must allege enough to show that the accused is not within the exception. In the leading case of *United States v. Cook* (1872), 84 U. S. 168, 21 L. Ed. 538, the Court set forth the above rule as follows:

> "Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception; but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense and must be shown by the

accused. *Steel v. Smith,* 1 Barn. & Ald. 99; Arch. Cr. Pl., 15th Ed. 54.

"Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment, and if they cannot be, in any case, without an allegation that the accused is not within an exception contained in the statute defining the offense, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed. *Rex v. Mason,* 2 T. R. 581."

United States v. Cook, 84 U. S. 168, 173-174, 21 L. Ed. 538, 539.

See also:

Hale v. United States (4th Cir. 1937), 89 F. 2d 578;

Sutton v. United States (5th Cir. 1946), 157 F. 2d 661, 665;

United States v. English (5th Cir. 1944), 139 F. 2d 885.

It is clear that when the Court speaks of an exception in the "enacting clause" of the statute in the *Cook* case, it does not intend to distinguish the section defining the offense from a subsequent section in the same Act. The Court, in *United States v. Cook, supra,* said in this regard:

"Cases have also arisen, and others may readily be supposed, where the exception, though in a subsequent clause or section, or even in a subsequent statute, is, nevertheless, clothed in such language, and *is so incorporated as an amendment with the words antecedently employed to define the offense,* that it

> would be impossible to frame the actual statutory charge in the form of an indictment with accuracy, and the required certainty, without an allegation showing that the accused was not within the exception contained in the subsequent clause, section or statute. Obviously such an exception must be pleaded, as otherwise the indictment would not present the actual statutory accusation, and would also be defective for the want of clearness and certainty. *State v. Abbey,* 29 Vt. 66; 1 Bish. Cr. Proc. 2d Ed., §639, n. 3."
>
> *United States v. Cook,* 84 U. S. 168, 174-175, 21 L. Ed. 538, 539-540.

In *United States v. Wood* (D. N. J. 1907), 159 Fed. 187, the defendant was charged with violating a statute making it unlawful to bring into the United States any Chinese person "in contravention of the provisions of this act." In quashing the indictment the Court quoted from *United States v. Cook, supra,* and said:

> "Here, then, we find an exception in the enacting clause of the statute. The crime is not fully defined by that clause; but we are compelled to look elsewhere to determine what constitutes the crime therein referred to. In such cases good pleading requires that the indictment should allege enough to show that the accused is not within the exception."
>
> *United States v. Wood,* 159 Fed. 187-188.

Appellant argues that it is a long-established rule that an indictment founded on a general provision defining the elements of an offense need not negative the matter of an exception made by a *proviso or other distinct clause.* Although this may be the general rule, it is obvious that the statute here in issue is not of the type involved in the case of *McKelvey v. United States* (1922), 260 U. S.

353. The statute in issue in the *McKelvey* case provided substantially as follows:

> "Sec. 3. That no person * * * shall prevent or obstruct free passage or transit over or through the public lands: Provided, This section shall not be held to affect the right or title of persons, who have gone upon, improved or occupied said lands under the Land Laws of the United States, claiming title thereto, in good faith."

The portion of the sentence preceding the proviso clearly defined the offense without referring to any exception, *i. e.,* no person shall obstruct free passage over public lands. As this Court pointed out in its decision in the *McKelvey* case, the proviso was not a *component* part of the definition of the offense. (273 Fed. 410, 415.)

Applying this test to the statute in the instant case, it is apparent that a different result is required.

The crime defined by Section 78, unlike the statute in the *McKelvey* case, is not, that no person shall transport meat, nor that no person shall transport meat which has not been inspected, but the crime is the transportation of meat which has not been inspected *in accordance with the terms of Sections 71 to 94 of Title 21.* Therefore, the very definition of the offense contains as a component part thereof a reference to Sections 71 to 94 and, as such, the exception contained in Section 91 becomes *a component part of the definition of the offense,* and must be negatived in the indictment.

Appellant cites the case of *United States v. Mendelsohn* (D. N. J. 1940), 32 F. Supp. 622, a case which was called to the attention of the District Court by the respondent in its original Memorandum of Points and Authorities [R. p. 15]. It is uncertain from the opinion

in that case precisely what allegations were contained in the indictment and whether the facts alleged there were identical with the facts alleged in the instant case. Moreover, respondent submits that the decision is erroneous if it be interpreted to hold that Section 78 of Title 21 does not incorporate by specific language, as a component part of the definition of the offense, the exception contained in Section 91 of the Act. Finally, of course, the decision of the New Jersey District Court is not binding on this Court.

None of the other cases cited by appellant (App. Op. Br. p. 11) are actually in point or of any help in deciding the instant case. In the case of *Edwards v. United States* (1941), 312 U. S. 473, 85 L. Ed. 957, there was no discussion of the statute involved and merely a citation of the *McKelvey* case. In addition, the statute apparently involved, Section 77(e) of Title 15 of the United States Code, contains no exception or reference thereto, and any exception thereto is contained in an entirely separate and distinct section. The case of *Northern Pacific Railroad Co. v. Lewis* (1896), 162 U. S. 366, 40 L. Ed. 1002, is a civil suit for damages and would appear to have no bearing whatsoever on the necessity of negating an exception in a criminal indictment. The cases of *Stokes v. United States* (1895), 157 U. S. 187, 39 L. Ed. 667, and *Evans v. United States* (1894), 153 U. S. 584, 38 L. Ed. 830, both appear to deal with criminal cases in which no contention was made by the defendant that the indictment was defective for failure to negate an exception, nor do the statutes involved appear to have contained exceptions or references thereto in the section defining the offense. Both these cases really dealt with the negating of potential defenses rather than exceptions to the statute. Finally, the case of *Taylor v. United States* (9th Cir. 1944), 142

F. 2d 808, does not appear to involve the issue in the instant case as this Court was not there concerned with an exception in the statute, but rather with whether the defendant had a defense to the charge. Like the *Stokes* and *Evans* cases above referred to, this was more a matter of negating a potential defense rather than an exception in the definition of the offense.

B. The Indictment Fails to Show Whether Safeway Is Being Charged as a Retail Dealer in Meat and Meat Products Supplying Its Customers, or Otherwise.

The indictment is likewise uncertain for the additional reason that it does not state whether respondent is being charged as a retail dealer in meat supplying its customers, or as a slaughterer, packer, canner or meat processor. It is an oft-stated rule that the indictment must set forth the facts so distinctly as to advise the accused of the charge and give him a fair opportunity to prepare his defense, so particularly that a conviction or acquittal would bar another prosecution for the same offense, and so clearly that the court may determine whether the facts stated support a conviction.

Sutton v. United States (5 Cir. 1946), 157 F. 2d 661, 663;

United States v. Lembo (3 Cir. 1950), 184 F. 2d 411;

Berger v. United States (1935), 295 U. S. 78, 81-83, 79 L. Ed. 1314.

The indictment violates this basic constitutional principle in its failure to set forth the character of respondent's activities allegedly in violation of the statutory offense. Therefore, the indictment does not contain sufficient facts to enable the respondent to be advised of the charge against it and prepare its defense accordingly.

III.

The Statute Upon Which the Indictment Is Based Is Unconstitutional in That It Is so Vague and Uncertain That It Fails to Give Fair Warning or Establish an Ascertainable Standard of Guilt and Therefore Violates the Fifth and Sixth Amendments to the Constitution of the United States.

It is fundamental that some substantial degree of definiteness is required of a statute, so that a person charged with its knowledge and existence can determine its applicability and meaning. And it is also well settled that a statute which prohibits the doing of an act in terms so vague that persons of ordinary intelligence must necessarily guess at its meaning violates both the constitutional guarantees of Due Process of the Fifth Amendment and the provision of the Sixth Amendment which requires that the accused be informed of the nature and cause of the accusation. The Meat Inspection Act, on its face, violates these constitutional guarantees since it is impossible to tell from the provisions of the Act what persons are included and what acts are prohibited by what persons under the Act.

In the case of *United States v. Cardiff* (1952), 344 U. S. 174, 97 L. Ed. 200, the Supreme Court of the United States affirmed the decision of this Court and held that the Food, Drug and Cosmetic Act was too vague for judicial enforcement. In that case defendant was charged with violating Section 301(f) of the Act which prohibited refusal to permit entry or inspection as authorized by Section 704. Section 704 authorized inspection after first making requests and obtaining permission for such inspection. In holding the Act too vague for enforcement, the Supreme Court said:

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what

persons are included or what acts are prohibited. Words which are vague and fluid (*cf. United States v. L. Cohen Grocery Co.,* 255 U. S. 81, 65 L. Ed. 516, 41 S. Ct. 298, 14 A. L. R. 1045) may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice. *Cf. Herndon v. Lowry,* 301 U. S. 242, 81 L. Ed. 1066, 57 S. Ct. 732. Affirmed."

United States v. Cardiff, 344 U. S. 174, 176-177, 97 L. Ed. 200, 202-203.

See also:

Winters v. New York (1948), 333 U. S. 507, 92 L. Ed. 840;

Connally v. General Construction Co. (1926), 269 U. S. 385, 70 L. Ed. 322.

That the foregoing language is equally applicable to the Meat Inspection Act is apparent from the foregoing analysis of the statutory provisions involved.

The final paragraph of Section 91 of Title 21 of the United States Code provides that the earlier provisions of said Act requiring inspection shall not apply to retail dealers in meat and meat food products supplying their customers. It is apparent that this provision was intended to exempt retail dealers, whatever that term may mean, from the inspection requirements, whatever they may be, of the Act.

Subsection (c) of Section 91 purports to define a "retail dealer" as one *chiefly* engaged in selling meat or meat food products to consumers only. Appellant has contended

(App. Op. Br. p. 16) that this requires that the *chief business* of a retailer be that of selling meat. Respondent contends that what was intended was that the dealer be engaged in selling meat *chiefly to consumers*. These basic differences in interpretation, if nothing more, point up the vagueness and uncertainty of the Act in this respect.

Far more serious than the grammatical problem of what the term "chiefly" was intended to modify is the meaning of the word "chiefly" itself. Webster's New International Dictionary, Second Edition, Unabridged, defines "chiefly" as follows:

> "1. In the first place; principally, preeminently; above all; especially. 2. For the most part; mostly; mainly. Also of or pertaining to chiefs."

Thus, the word "chiefly" means "mainly" or "principally." That these words are equally vague and uncertain and do not fix an ascertainable and definite standard for the purpose of determining who is a "retail dealer" is evident from the following authorities, each of which held that the word "principal," when used in a criminal statute in an analogous context, was so vague and uncertain as to violate the Due Process clause of the State Constitution involved.

In the case of *State v. J. B. Powles & Co.* (Wash. 1916), 155 Pac. 774, the Court was confronted with a licensing and regulatory statute pertaining to commission merchants. Defendant was charged by a criminal information with conducting a commission merchant business without a license. The statute defined a commission merchant to be one "whose principal business" was the sale of certain products on account of the shipper or consignor. In sustaining a demurrer to the information, the Supreme

Court of Washington made the following statements which are equally applicable to the instant case:

> "The definition attempted in the statute is fatally vague. *Is the principal part of a business 51 per cent of mere pecuniary receipts?* One may do a business in which only 49 per cent in gross receipts is of the commission sort, and yet in which that sort is the most profitable. When one has total receipts of $100,000 per annum, the commission part may be but $20,000, and yet his 10 other kinds of business might bring in less than $10,000 each. Thus, in both gross and net profits the commission department might bring in less than half of all the others put together, and yet bring in much more than any one. There, in one sense, the chief business would be of a commission kind. Would it, though, be the principal within this statute, when it is principal only by that kind of comparison? We are unable to say. We cannot hold, as the lower court did, that 'principal' means either gross majority in profits or more than half of all the receipts, or that it means more than any other one kind of receipts. Accordingly, upon the mere basis of money, the statutory definition is vague beyond hope.
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> "But perhaps the Legislature meant by 'principal' *that which brings the most customers or the most transactions,* as where, though only 30 per cent in receipts is of the commission sort, the latter has several times as many transactions as all the others put together. Thus, suppose the commission department causes 1,000 transactions, and yet constitutes a minority in money received, while the other departments, bringing in 51 per cent of the total money, are but 100 in number, shall it be said that the commission business is not the principal one there?

"Finally, *during how long a period is the test to be applied?* Is it the seasonal or the annual receipts that shall control, or is it a view of the man's business during two or three years? Shall a merchant only starting in business and opening a commission department be judged immediately, or shall the state wait a year or two until his status is reasonably established?

"This sufficiently answers also the state's attempted definition of the word 'principal.' We cannot say that this word meant regular rather than casual, for who shall define what is regular or what is casual? Some casual transactions may be of great moment and bring in during a considerable period a large excess of gross receipts."

State v. J. B. Powles & Co., 155 Pac. 774, 775.

Similarly, in *State v. Levitan* (Wisc. 1926), 210 N. W. 111, a Wisconsin licensing statute pertaining to wholesale produce dealers was declared unconstitutional. The statute defined a wholesale produce dealer as a person engaged in the business of buying produce for resale principally to others than consumers. In concluding that the definition of a wholesale produce dealer was uncertain, and consequently void, the court said:

"The term 'principally' is a relative term, and its meaning is oftentimes uncertain and indefinite. A violation of the statute is constituted a misdemeanor and is punishable, as such, by fine or imprisonment. Such statutes should be reasonably definite, so that anyone who is liable to incur the penalty provided thereby may determine whether or not he comes under the act, and whether or not he is liable to incur such a penalty. * * *"

State v. Levitan, 210 N. W. 111, 118.

The foregoing cases clearly establish that the word "principal" does not have a sufficiently definite meaning when used in a criminal statute. Obviously, the word "chiefly" suffers from the same fatal defect and leaves the whole statute without a fixed standard of guilt as to the crime which Safeway is alleged to have committed. Particularly is this true in the light of the Government's argument that Safeway is not within the "retail dealer" exemption.

The fact that the vagueness is in an exception to the statute does not save the statute. In the case of *Cline v. Frink Dairy Co.* (1927), 274 U. S. 445, 71 L. Ed. 1146, the Court was concerned with the Colorado Antitrust Law which denounced certain conspiracies and combinations. The section defining the combinations prohibited provided that no agreement or association should be deemed unlawful where its object was to conduct operations at a reasonable profit. In holding the statute void as violative of due process of law under the Fourteenth Amendment, the Supreme Court of the United States said:

> "Such an exception in the statute *leaves the whole statute without a fixed standard of guilt in an adjudication affecting the liberty of the one accused.* An attempt to enforce the section will be to penalize and punish all combinations in restraint of trade in commodity when in the judgment of the court and jury they are not necessary to enable those engaged in it to make it reasonably profitable, but not otherwise. Such a basis for judgment of a crime would be more impracticable and complicated than the much simpler question in the *L. Cohen Grocery Co.* case, whether a price charged was unreasonable or excessive. The real issue which the proviso would submit to the jury would be legislative, not judicial. To compel defend-

> ants to guess on the peril of an indictment whether one or more of the restrictions of the statute will destroy all profit or reduce it below what would be reasonable, would tax the human ingenuity in much the same way as that which this court refused to allow as a proper standard of criminality in *International Harvester Co. v. Kentucky*, 234 U. S. 216, 232, 233, 58 L. Ed. 1284, 1292, 34 Sup. Ct. Rep. 853."
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> *Cline v. Frink Dairy Co.*, 274 U. S. 445, 457-458, 71 L. Ed. 1146, 1152.

The impossibility of determining who is a "retail dealer" within the meaning of the Act is further compounded by the proviso portion of the first sentence of Section 91(c). The initial portion of this sentence provides that a retail dealer is one chiefly engaged in selling meat to consumers. Thus it appears that anyone performing exclusively retail operations, *i. e.*, selling only to consumers and not to retailers, is a retail dealer and it does not matter if he sells in interstate commerce or whether he sells animal carcasses or meat food products. A retail dealer's power to sell must include the power to transport. This is supported by that portion of the legislative history relied upon by the Government (App. Op. Br. p. 18) which speaks of peddling across the state line. However, a proviso is tacked on to this otherwise clear definition the first part of, which states that the Secretary of Agriculture may permit a retail dealer to transport to consumers and *meat retailers* a limited number of animal carcasses weekly. It is impossible to tell what was intended to be the effect of this proviso, but it apparently empowers the Secretary of Agriculture to expand the definition of a retail dealer by including, at his discretion, a dealer who is also performing the functions of a wholesaler, *i. e.*, selling to meat retailers.

If the proviso means what the Government contends it means, *i. e.,* that there is no exemption in favor of a retail dealer other than one at the discretion of the Secretary of Agriculture, then the final paragraph of Section 91 is entirely meaningless.

If the exemption is meaningless, and the Government contended before the District Court that it was "an illusory exception" [R. p. 22], this is further proof of the vagueness and uncertainty of the statute. Nothing could be more uncertain than to place an apparent exception in a statute and then so define it and attach provisos thereto so that there is really no exception at all and anyone relying thereon is committing a crime. If this was the intent of Congress, and respondent submits that this cannot have been its intent, or if this is the result of the statutory language, then the statute violates the Fifth and Sixth Amendments to the Constitution and cannot be enforced.

Conclusion.

For all of the reasons hereinbefore set forth, respondent respectfully submits that the decision of the District Court in dismissing the indictment should be affirmed.

Respectfully submitted,

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